Bombay High Court
In The Matter Of Manuel Theodore ... vs Unknown on 27 October, 1999
Equivalent citations: 2000 (2) BomCR 244, II (2000) DMC 292
Author: F Rebello
Bench: F Rebello

ORDER F.I. Rebello, J.

1. Two couples, Indian citizens, professing the Christian faith, applied to this Court for being appointed as guardians under the Guardians & Wards Act. In the course of the proceedings they amended their petition, to seek a prayer that the children be given to them in adoption. The petitioners being Christians are presently only entitled to be appointed as guardians. They do not fall within the definition of "Hindu" as defined in the Hindu Adoption & Maintenance Act, 1956. A question immediately arose, whether a civilised State committed to the Rule of law, governed by a written Constitution and signatory to International Conventions on the Rights of a child, could deny to a section of its own citizens the right to adopt a child and to give that child, a home, a name and nationality. Article 14 of our Constitution ensures equality before law to all citizens.
Non-arbitrariness is the hallmark of this Article. On 26th November, 1949 we gave to ourselves, a Bill of Rights, when the Constituent Assembly voted and approved the Preamble to the Constitution of India. The "Tryst with Destiny" Speech, of the first Prime Minister of the new Nation, symbolised its hopes and aspirations. Much earlier our Noble Laureate Gurudev Tagore had penned a poem. Where the mind is without fear and the head is held High visualising what the new nation yet to be born out of the freedom struggle must aspire. These hopes and aspirations permeate the preamble to our Constitution. They now constitute our Rule of law. The Preamble is the judicial tool. This tool is of metal which is malleable, ductile and tenacious. Its effectiveness and strength lies in the hands of the maker. Belief in the Constitution and social commitments temper the approach in its use. Experience and age adds maturity to actions. Practical field experiences adds to this armoury. Experience, therefore, has a great role to play not only in shaping our thoughts but in our approach in interpreting the constitutional provisions. The fight against injustice must be inherent in you. It cannot be conferred or imposed by mere occupation of a judicial chair. Justice does not flow from the chair, but from the person occupying it. The chair reflects authority. The weak should not occupy it, nor the submissive. The Constitutional structure will be damaged beyond repair if Constitutional functionaries fail to express their views. Expressing views which may not be palatable to some is not dissent, but upholding of Constitutional values. These are not stray or rambling thoughts. These views are borne out of experience. A reflection of the present and the past.

A Division Bench of this Court sitting at Panaji, Goa a decade ago presided over by a Visiting Judge, had to hear a petition filed on behalf of orphan children housed in Homes run by an Institution known as Provedoria Assistanca Publica. These children from the infancy were left in the custody of these Homes. All through their young life that was home to them. The Government of Goa issued a Circular that on reaching majority, both girls and boys would have to leave the Institutions. Most of them were not trained for any occupation and were otherwise unemployed. By the petition, relief was sought that they should be allowed to stay even after attaining majority or till they were employed and/or rehabilitated in a useful vocation. The learned Judge after hearing Counsel for the

petitioner summarily dismissed the petition whilst expressing, 'oh what beautiful poetry'. The Judge was appreciative of the language of the petition, but deaf to the orphans anguished cry for justice.

Many of us examining such issues forget that we have taken a solemn oath or protect and defend the Constitution. That requires examining legislation and fundamental rights in such a manner that the tears of the abandoned and homeless infants are wiped away, of course within the Constitutional parameters. In this matter the exercise of power of parens patraie and Article 226 to give effect to the fundamental rights, what is in issue are the enforceability of directive principles and International covenants to which India is a signatory.

It was the Poet Khalil Gibran who in a couplet said:---

"Our children are not our children, they are the sons and daughters of life, longing for itself."

How long must these children wait for justice in the absence of positive steps taken by the State. Even the good Lord seems to have forgotten them. I quote from the Book of Psalms:

"How long, Oh Lord? Will thee forget me forever".

They are children just like other children. These are children, however, without home and family. Don't they have a right to love and security. Should not the Constitution be also meaningful to them. Having been orphaned should the Republic abandon them forever.

The Rule of law must reach them. Protests, from whatever sections should not stop the pursuit of justice to those in need of it. The right of a child cannot be confused with the personal law of any section of our pluralistic society. Adoption is not to be treated as an act by a State to force a child on unwilling parents. On the contrary it is a voluntary act on the part of eligible persons to provide comfort, love and security to the abandoned and homeless children. No religion, can deny family love to these children of God. Religions preach peace and brotherhood. How can there be brotherhood if you will not treat a section of your citizens as brothers. Children are the living embodiment of God. In them you find the manifestation of God in all its forms. In the smile of the child you see beauty of creation.

2. The question then, in the absence of legislation has the Court powers of giving an abandoned or orphaned or destitute child in adoption? Before formulating the questions I may once again refer to the Bible, the Gospel by Mathew. When a disciple came to Jesus saying "who is the greatest in the Kingdom of Heaven? Calling a child, he put him in the midst of them and said "Truly, I say to you, unless you turn and become like children, you will never enter the Kingdom of Heaven. Whoever humbles himself like this child, he is the greatest in the Kingdom of heaven. Whoever receives one such child in my name receives me:...."

To answer the question, the points formulated are as under:---

1. Does an abandoned or orphaned or destitute child has a right to a family, a name and nationality as a part of the right to life?

2. Is the right of being adopted a fundamental right guaranteed to a child by Article 21 of the Constitution?

3. Can the State deny to a orphaned, abandoned or destitute child the right to be adopted because of its constitutional failure to enact legislation to give effect to Entry 5 of List III of the Seventh Schedule to the Constitution of India?

4. Whether a married childless couple has the fundamental right to adopt a child?

5. Is adoption purely a part of personal law?

6. If the right to adopt is a fundamental right, can Civil Courts enforce this right, in the absence of legislation and/or administrative instructions having the force of law?

7. Can this Court in exercise of the power conferred on it under Clause 17 of the Amended Letters Patent give a child in adoption?

3. Counsel arguing for Adoption have raised various submissions to support the contention that a child in the absence of law can be given in adoption. The Advocate General of State of Maharashtra, after referring to judicial authorities pointed out to the Court that both Houses constituting the Legislature of the State of Maharashtra had passed a Bill which was awaiting assent of the President of India. On behalf of the Union of India, the learned Additional Solicitor General strongly contended that in the absence of legislation courts cannot pass orders. Matter pertaining to adoption being a sensitive issue the Court should not pass any orders which rightly belongs to the domain of the Legislature and or the Executive. It is further pointed out that Article 21 is couched in a negative language and as such also no relief can be granted by the Court. Various Institutions have also put forward their views which I would briefly refer to.

4. The Indian Council of Social Welfare has submitted their written submissions. It is pointed out that on 26th January, 1990, sixty countries signed the Convention of the Rights of the child. India ratified. The Convention on the rights of the child on 2nd December, 1992. The Convention imposes the commitment to provide for all children in India, a first lien on all resources for their welfare and protection. The need for adoption for the rehabilitation of destitute/orphan children is very much included as part of this. There are about 12.32 million orphans/destitute children in India and the number is ever increasing. They constitute about 4% of the child population. There are about 1,50,000 children in over 1000 institutions in the country, which are under the Juvenile Justice Act. These children are denied parental care and attention. A child needs love, shelter, care, a sense of identity and belonging. These are normally obtained in families. In case of breakdown of a family there are only three possible ways of looking after a child (a) strengthening the family; (b) Institutional care and (c) Foster care/adoption. Studies have shown that institutional care does not provide all the needs of a child, especially personal attention. The Institutions are also expensive

and overcrowded. Therefore, adoption is a means for finding a right parent for the child and not the other way round. The right of a family to every child is a necessity. Adoption is one of the best means of rehabilitating a child without a family and giving stability needed for its normal growth and development.

Nine Institutions involved in looking after abandoned/destitute children have also submitted a Memorandum. These include, Bal Anand, Family Service Centre, Indian Association for Promotion of Adoption and Child Welfare, Convener, Adoption Group, M.S.W.G. Asha Sadan, Shajar Chhaya, Bal Asha Trust, Missionaries of Charity and Children of the World (India) Trust. In their submission they point out that they are concerned with care and rehabilitation of children who are orphaned, abandoned, declared destitute or relinquished in their care by their biological parents. They have intimate knowledge of the trauma these children experience. Above the psychological impact of rejection early in life, the child who is taken under the guardianship provision, faces further discrimination being only a "ward" of his or her guardian upto the age of 18 years. Though receiving the care, nurture and love in the guardian's family these children suffer deprivation compared to a legally adopted child. From a basic humanitarian point of view, it is uncon-

scionable on the part of the State to deprive the destitute child the status equivalent to a biological child with rights and obligations in the family of his/her guardian, which are conferred to the child adopted under the Hindu Adoption and Maintenance Act, 1956. It is a travesty of justice that the State which has guaranteed its citizens protection against discrimination based on religion should withhold protection and security in this respect particularly to the helpless minor. The State has abdicated its commitment made to the child, under the U.N. Convention on the Rights of the Child, by not making appropriate provisions for full adoption of the child.

5. On behalf of Archdiocese of Mumbai, appearance has been put on behalf of Archbishop of Mumbai, to whom notice was issued, as the matter arose from petitions for adoption by Christian couples who had initially applied only for guardianship. Similar submissions as made on behalf of various institutions are reflected therein. Apart from that it is specifically set out that there is no bar for Christian parents to adopt a child. Reference is made to Canon Nos. 110, 877 and 1094. They are reproduced herein below:---

"Canon No. 110:---Children who have been adopted in accordance with the civil law are considered the children of that person or those persons who have adopted them."

"Canon Ho. 877:---# 1 The parish priest of the place in which the baptism was conferred must carefully and without delay record in the register of baptism the names of the baptised, the minister, the parents, the sponsors and, if there are such, the witnesses, and the place and date of baptism. He must also enter the date and place of birth.

#2 In case of a child of an unmarried mother, the mother's name is to be entered if her maternity is publicly known or if, either in writing or before two witnesses, she freely asks that this be done. Similarly, the name of the father is to be entered, if his paternity is established either by some public document or by his own document in the presence of the parish priest and two witnesses. In all

other cases, the name of the baptised person is to be registered, without any indication of the name of the father or of the parents.

#3 In the case of an adopted child, the names of the adopting parents are to be registered and, at least if this is done in the local civil registration, the names of the natural parents in accordance with # 1 and #2, subject however to the rulings of the Episcopal Conference."

"Canon No. 1094:---Those who are legally related by reason of adoption cannot validly marry each other if their relationship is in the direct line or in the second degree of the collateral line."

It is further set out that Adoption also traces its history from scriptures although strictly speaking, no laws of adoption as such are found formulated in the Old Testament. In Exod. 2:10, Moses becomes son of Pharaoh's daughter. In Ruth 4:16, Naomi adopted the son of Boaz and Ruth. In Esth. 2:7, Mordeci adopts Esther. In Gen. 16:1-4 and 30:1-13, Sarai Rachel and Lean each gave a female slave to her husband for the purpose of procreation. Gen. 16:2 and 30:3-13 gave a Biblical account which could imply adoption by wife and her regard for the children as her own and has also reference to possible allusion by Rachel to an adoption right. Gen. 48:5-6 shows that Ephraim and Manasseh are adopted by their grandfather Jacob. In the New Testament, there are references to adoption as sons in Rom, 8:15, 23, Gol. 4:5. There is also an interpretation and reference that a Slave, if adopted as a son would inherit his master's property in a phrase addressed to Slaves in Col. 3:24. The idea of adoption can also be linked to the idea of the Holy Spirit in the New Testament and Rom. 8:23 speaks of waiting for adoption as sons wherein Paul regards adoption as a promise for future. Then, Acts, 7:21 and Heb. 11:24 understand Moses as the adopted son of Pharaoh's daughter. It will, therefore, be seen that the concept of adoption also flows from scriptures. Catholic Bishop's Conference of India had given its unqualified approval to the Christian Adoption and Maintenance Bill, 1994. The Bill, however seeks to exclude Goa and some other areas. The drafters of the Bill perhaps are unaware that in Goa, Daman & Diu also there is no provision for Adoption for other than Hindus by law and that those areas, therefore, ought not to be excluded.

The following Unstarred Question No. 752 was tabled in the Lok Sabha on 6th March, 1996. The answer is reproduced herein below:---

"752. SHRIMATI SUSEELA GOPALAN:

Will the PRIME MINISTER be pleased to state:

(a) whether Christian community has requested the Government to make progressive changes in the Indian Christian Act;

(b) If so, the details thereof; and

(c) the time by which the legislation is likely to be introduced?

ANSWER THE MINISTER OF STATE IN THE MINISTRY OP LAW, JUSTICE AND COMPANY AFFAIRS:

(SHRI H.R. BHARADWAJ):

(a) to (c): The Joint Women's Programme, a Women's organisation has submitted certain draft legislation relating to marriage, divorce, adoption, maintenance and succession amongst Christians for enactment. As the Policy of the Government has been not to interfere in the personal laws of the minority communities unless the necessary initiative therefor comes from the community concerned, the Government has requested the National Commission for Minorities to give its considered thought on the idea, that the views of the Christian community may be assessed by the Commission by interacting directly with different sections of that community before the matter is processed further. Hence it is too early to set any time-frame for undertaking any legislation in this regard."

To our Legislators the law making limb of our Constitutional Structure. I may only remind them of the words of Gabrieala Mistral:---

"We are guilty of many errors and many faults but our worst crime is abandoning the children, neglecting the fountain of life.

Many of the things we need can wait. The child cannot.

Right now is the time his bones are being formed, his blood is being made, and his senses are being developed.

To him we cannot answer "Tomorrow,"

His name is "Today."

II. FAMILY AND ADOPTION:

7. Social Scientists, Jurists and others accept that there is no single, universal method of classifying households in which people live together. Two types of families feature in current social and legal research; the 'extended' and the 'nuclear' family. In Blackwell v. Bull, 1836, Lord Langdale MR stated: 'It is evident that the word 'family' is capable of so many applications that if any one particular construction were attributed to it in wills, the intention of testators would be more frequently defeated than carried into effect. Under different circumstances it means a man's household, consisting of himself, his wife, children and servants; it may mean his wife and children, or his children excluding his wife; in the absence of wife and children, it may mean his brother and sisters or his next of kin, or it may mean the genealogical stock from which he may have sprung. All these applications of the word and some others are found in common parlance'. The reference to the family is in the context of the role of the child in the family. It is clear that whether it be a 'nuclear' family or in common parlance, the child forms a part of what is popularly known as family. It is this

child which we are concerned with.

8. "Adoption is currently defined as a legal and social process by which the child of one pair of parents becomes the child of other parents. Adoption confers upon the child and the adoptive parents the same mutual rights and the obligation that exists between the child and his natural parents. The adoptive child is permanently removed from his biological parents and becomes the legitimate child of his adoptive parents. In theory, the adoptive child secures all the rights and performs all the duties of a biological child." (Carlson. 1965). In Corpus Juris Secundum, Volume 2 adoption has been defined as the establishment of the relation of parent and child between persons not so related by nature. A popular meaning, apart from the law, is the taking of a child, not one's own, into the family and rearing it. Adoption in legal contemplation, is the act of which the parties thereto establish the relationship of parent and child between persons not so related by nature, and which, in many respects, severs the natural relations existing between the child and its parents, although in a narrower sense it is restricted to the act of the person taking the child. Adoption also has a popular meaning, apart from its use in the law. While generally the term has reference to some form of legal procedure, in common use, it is frequently applied to taking a child, not one's own, into the family and rearing it. Historically in so far as our country is concerned, adoption has been accepted as a custom which stands ultimately codified under the Hindu Adoption & Maintenance Act. Again in C.J.S. it is set out that Adoption is a practice of very great antiquity. It appears to have been known to the Egyptians, Babylonians, Assyrians, Greeks, and ancient Germans, and among the Hebrews the Practice, although probably not recognised by their system of jurisprudence, was undoubtedly well-known.

Ms. Madhavi Hegde-Karandikar's, "Issues, Laws & Procedures on Adoption" sets out that in ancient times, the practice of adoption prevailed both in the East and the West. It prevailed in ancient times in Greece and Rome. The ancient Roman law provided for State intervention and required official sanction for adoption. In ancient times, adoption was primarily concerned with strengthening a family by giving it direct heirs. It was essentially a family-oriented practice with the main objective of continuance of the family for religious purposes (for example, performance of last rites by a son in India) and inheritance of property. The children adopted were mostly from amongst the kith and kin or at least from the same caste (particularly in India). Adoptions were rarely carried out for security and welfare of the children in need. (Billimoria, 1984).

In India, the importance attached to a male successor provided the main motivation for adoption. The son begotten from the wedded wife occupied the highest status and in the absence of one, the adopted son took the position of importance. In the times when polygamy was legally and socially accepted, children born from the concubines or from illicit relationships were also given some status and limited rights over maintenance and inheritance of property. The Rao Rajas and Rao Ranis from princely states were the off springs of the Maharajas but not begotten from the wedded wives. They were brought up in the palaces, given the same education and other facilities as the princes and princesses, and even inherited properties but they could never be given succession rights over the throne. Thus the ancient Hindu tradition in India conferred some recognition and protection upon illegitimate children but one does not easily come across instances of adoption of a male child by father who had a legitimate female child or even an illegitimate male child.

9. Let me now refer to several excerpts from the Book. "Ours by Choice" by "Nilima Mehta". The learned author points out that: It is found that most of the personality characteristics which make people seem pleasant or unpleasant are a result of their upbringing or nurturing. The child who is brought up in a neglected, unloved and emotionally deprived environment will blossom in a happy home; even the child's appearance will be transformed. They will start resembling the people who take care. The child will adopt your expressions, gestures, behavioural patterns to such an extent that strangers might even remark on the resemblance between you and your adopted child. Most of the characteristics which make people seem pleasant, likable or un-likable are a result of a upbringing and what they have imbibed through role modelling. The values of caring, concern, justice, honesty, integrity are all learnt from parents and they are attributes of the mind and personality which are created, nurtured and learnt through environmental influences. Infant research has reinformed the importance of environmental influences on a child's personality development. Despite being of a lower socio-economic background and born to illiterate parents, for instance, adopted children were found to be leading very successful lives. They had not developed characteristics of their biological parents, but had imbibed the standards, values and attributes of their adoptive parents. While the contribution of environment and upbringing to a child's personality is thus determined, heredity cannot be ignored. Even an ideal environment can only develop what is already present in an individual. No amount of coaching or pressure can develop in a child an artistic or musical talent that did not exist in the first. What about the adopted child's level of intelligence? Psychologists and social scientists believe that a child's basic intelligence is the one they are born with. Apparent intelligence is the result of education exposure and social learning. Sometimes people from deprived, non-stimulating environments may seem very dull, even though they are not actually so. It is hard to accurately predict a child's intelligence, but heredity does play an important role in this area. Each child is an individual in her own right and should be considered and accepted as such. Destitute children certainly need adoptive homes and families that will give them opportunities they might not have otherwise had. To live in the shadow of unrealistic parental expectations is unfair to any child. It is being increasingly felt that even bad or broken homes are better than not having a home. Every child has a right to have a home in loving care and within the effective atmosphere of the home.

In India the only existing legislation on Adoption is the Hindu Adoption and Maintenance Act, 1956. Non-Hindus have can only avail of the Guardianship & Wards Act, 1890. As a result of canvassing by child welfare groups, the Joint Select Committee of Parliament approved the Adoption of Children Bill of 1972 which was introduced in Parliament in 1978 but later withdrawn. A modified bill known as Adoption of Children Act, 1980 was introduced which excluded Muslims. However, nothing came out of the same. In fact on the initiative of the Christian Community of India, a Bill was forwarded known as Christian Adoption and Maintenance Act, 1995. It had the support of the Catholic Bishops' Conference of India as also of the various other Christian denominations throughout the country. However, nothing has emerged inspite of the readiness of Christian community in the country to accept the bill on Adoption & Maintenance. The Maharashtra Legislative Assembly introduced a bill on 9th August, 1995 known as "Maharashtra Adoption Act, 1995". The Act was made applicable to every person adopting a child in the State irrespective of the persons's religion, caste and creed. The Bill sought to displace The Hindu Adoption and Maintenance Act, 1956 in the State of Maharashtra. Section 27 of the bill, is a saving provision whereby on coming into force of the Maharashtra

Adoption Act the provisions of Hindu Adoption and Maintenance Act, 1956 will cease to have effect in the State of Maharashtra. In the Statement of Objects and Reasons it is set out that the Legislation was enacted to give effect to Articles 32 and 44 of the Constitution. The Bill is pending assent of the President of India. There I believe are various objections filed by some groups.

III. ARTICLE 21:--- Right to Life:

11. The judicial long march to find the true scope and intent of Article 21 ironically began with those associated with suppression of liberty during the emergency. Emergency politics led the search for human rights. The Constitution once stated by Justice Vivan Bose, as meant for the Butcher, the Baker and the Candle stick maker has given way to what Justice Krishna Iyer says, as for the tortured prisoner, the bonded labourer, the discriminated gender, the marginalised, dissenter and the disabled, deprived human. The case of Smt. Maneka Gandhi v. Union of India and another, , was the water shed in this historical march in a deeper understanding of the Constitution and more specifically Articles 14 and 21 of the fundamental rights: The Apex Court observed that the purpose behind Article 21 was to help the individual to find his own viability, in order to give expression to his creativity and to prevent governmental and other forces from alienating the individual from his creative impulses. These are rights which are wide ranging and comprehensive. Though Article 21 is couched in a negative meaning nevertheless it confers right to life and personal liberty.

Immediately thereafter in the case of Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and others A.I.R. 1981 S.C. 746, the Apex Court observed that the fundamental right to life which is the most precious human right and which forms the ark of all other rights, must, therefore, be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. While understanding the proper meaning and content of the right to life, it must be understood that it is a constitutional provision which is being expounded and moreover it is a provision enacting a fundamental right. Court's should always attempt to expand the reach and ambit of the fundamental right rather than to attenuate its meaning and content. Constitutions, it is pointed out, are not ephemeral enactments designed to meet passing occasions. They are designed to approach immortality as nearly as human institutions can approach it. The term "life" as used in Article 21 is something more than mere animal existence. The right to life includes the right to life with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings. These human rights represent the basic values cherished by men since civilisation began. They are wide ranging and comprehensive and include the right to equality, right to freedom, right against exploitation, educational rights and the right to constitutional remedies. Of course, the magnitude and content of the components of these rights would depend upon the extent of the economic development of the country, but it must, in any view of the matter include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation protanto of his right to live and it would have to be in accordance with reasonable, fair and just procedure established by law, which stands the test of

other fundamental rights. This exposition came after judgment of the Apex Court in the case of Additional District Magistrate, Jabalpur v. Shivakant Shukla, , during the emergency period, when the right to life and liberty were denied to the citizens of this country. The Apex Court then by a majority judgment had held that the right to personal liberty is the right of the individual to personal freedom nothing more and nothing less. That right along with certain other rights had been elevated to the status of fundamental right in order that they may not be tinkered with and in order that a mere majority should not be able to trample over them. That right was, however, subject to the right of the President under Article 356 to suspend the enforcement even of these rights which were sanctified by being lifted out of the common morass of human rights. The Apex Court observed that the enforcement of the fundamental rights can be suspended during an emergency.

12. The various facets of Article 21 as now being discovered by the Apex Court have led the Judges to search the various hues of its composition, in order to make our society more humane and just, in tune with the Constitutional mandate as reflected by the preamble. The Preamble has become the viewing glass. The fundamental rights are now viewed from the language of the preamble. Directive principles no longer mean what the Nation must aspire and what the Legislature and Executive must proceed to make functional. Article 21 amongst the fundamental rights is now the pinnancle of the pyramid that constitutes the basic rights of citizens. To understand these basic or what are known as human rights we have to examine the diverse implication of the term "life". These rights could either be positive or moral. The rights which have been conferred on us, by the law of the country and which are subject to revocation by relevant Legislation can be termed as positive rights. In this sense moral rights are principal rights which appeal to the ethical and emotional feelings of every human being. These rights are coextensive with the right of man himself. These are rights which cannot be revoked. They are inalienable rights that man acquires by the very fact that he belongs to the human race. The first such acceptance was in the Bill of Rights as adopted in Virginia on June 12, 1776. Its first article affirmed that:-

"... All men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

It was so reflected in the French Revolution which proclaimed and endorsed that "Men are born, and always continue, free and equal in respect of their rights." The right traceable to Article 21 are basic and inalienable rights. Protection of these rights forms part of the Rule of Law. We must remember that the Rule of law provides the foundation and the basic for legal respect and for human dignity. Lawyers and Judges together are the engineers of this human right jurisprudence. Only an activist bar can broaden and innovate social action litigation to motivate courts to promote public interest "lis", since Judges are obliged to do justice.

13. We may now examine the judicial precedents, to find whether in the search for justice, of the cause being expounded, the Constitutional ship can be navigated into the harbour of human rights. Navigation today may be much easier than was for the first explorers - Magellan, Vespuci, Columbus

or Vasco-de-Gama, amongst the Europeans. Now Captains who have occupied seats on the judicial ship of justice have charged out courses in their pursuit and in the search for human rights. These we call precedents.

In the case of Bandhua Mukti Morcha v. Union of India and others, the Apex Court was considering a petition by public spirited organisations on behalf of bonded labourers. While passing directions for relief, the Apex Court observed as under :---

"The right to live with human dignity, free from exploitation enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and the children of tender age against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and neither the Central nor any State Government has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

In the case of Olga Tellis and others v. Bombay Municipal Corporation and others, , the Apex Court was considering the rights of pavement dwellers, residing on the footpaths of public streets in Bombay. What is important from this judgment is that the Apex Court in no uncertain terms held, that the Constitution is not only the paramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. Then considering as to what would be the right to life the Apex Court has observed as under :-

"The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away, as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life."

While interpreting the right to life and generally the fundamental rights, the directive principles which are fundamental in the governance of the country, have served as the beacon light in the interpretation of the constitutional provisions.

In the case of State of Himachal Pradesh and another v. Umed Ram Sharma and others, , the Apex Court in a Public Interest Litigation petition had to consider whether the right of usable roads to

poor in so far as residents of hilly areas would constitute a part of their right to life. After examining Article 38(2), Article 19(1) (d) and Article 21 the Apex Court held that residents of hilly areas as far as feasible and possible, society has constitutional obligation to provide roads for communication in reasonable conditions. The Apex Court then went on to hold that the affirmative actions by the judiciary is sometimes necessary to keep the judiciary in tune with the legislative intention.

13. In Lakshmi Kant Pandey v. Union of India, Apex Court was considering the conditions to be imposed on foreigners taking a child in adoption. At the relevant time and even today there is no statu-

tory enactment in India providing for adoption of a child by foreign parents or laying down the procedure which must be followed. In this context the Court was considering the rights of the child and child welfare. The Apex Court observed that children are "supremely important national asset" and the future well being of the nation depends on how its children grow and develop. The Court then quoted Milton for the following:---

"Child shows the man as morning shows the day."

The child is a soul with a being, a nature and capacity of its own, they must be helped to find them, to grow into their maturity, into fullness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. The following observations are noteworthy:---

"Now obviously children need special protection because of their tender age and physique mental immaturity and incapacity to look after them-selves. This is why there is a growing realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they have to play in the nation building process without which the nation cannot develop and attain real prosperity, because a large segment of the society would then be left out of the developmental process. This consciousness is reflected in the provisions enacted in the Constitution by enacting Clause (3) of Article 15 which enables the State to make special provisions inter alia for children and Article 24 which provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment".

In his Foreword to Manual on Adoption, A guidebook on Principles, Practices and Procedures, brought out by Indian Association for Promotion of Adoption, Justice Bhagwati, who had spoken for the Bench in Lakshmi Kant Pandey (supra) observed that the directions given on Inter-Country Adoption were given as a part of the fundamental right of the child to life under Article 21 of the Constituion. This is what Justice Bhagwati said "The laying down of the procedure and the guidelines was almost in the nature of legislation by the Court but, it had to be done, because the Government was dragging its feet in enacting a suitable Adoption of children Act and it was necessary for the Court to intervene to protect the fundamental right of the child to life under Article

21 of the Constitution." Even without that from the judgment itself it was apparent that it was referable to Article 21, as the petition was under Article 32 and reference to Article 15(3) and 24 were in aid thereof. The Court accepted the right to a home, a name and a family as a part of the "right to life".

Why must these children be treated as castaways of society to be ostacrized, and carry the mark of "cain" on their heads for no fault of their's.

14. In Vikram Deo Singh Tomar v. State of Bihar, 1988 (Supp.) S.C.C. 734 the question arose before the Apex Court on a letter informing the Apex Court that female inmates of Care Home of Patna (Bihar) were compelled to live in inhuman condition in an old dilapidated building, that they were ill-treated, provided food which was both insufficient and of poor quality. While dispos-

ing of the petition and issuing directions the Apex Court observed that under Article 21 of the Constitution, every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian Citizen and it is in the discharge of its responsibilities to the people, the State recognises the need for maintaining establishments for the care of those unfortunates, both women and children, who are castaways of an imperfect social order and for whom, therefore, of necessity provision must be made for their protection and welfare. Both out of common humanity and considerations of law the State is bound to provide such Homes to abide by the constitutional standards recognised by well accepted principles. It is incumbent upon the State when assigning women and children to such Homes that it must provide minimum conditions ensuring human dignity.

In Pt. Parmanand Katara v. Union of India and others, the issue was of providing immediate minimum medical aid to injured persons. The Apex Court observed that Article 21 of the Constitution casts an obligation on the State to 'preserve life'. While dealing with an accident victim the Doctor whether attached to a public or private hospital has the professional obligation to render service with due expertise for protecting 'life'.

In Ramsharan Autyanuprasi and another v. Union of India and others, the Apex Court was called upon to settle a dispute in respect of the Museum Trust created by Maharaja of erstwhile Jaipur State. While disposing of the petition the Apex Court observed as under :---

"It is true that life in its expanded horizons today includes all that gives meaning to a man's life including his tradition, culture and heritage and protection of that heritage in its full measure would certainly come within the encompass of an expanded concept of Article 21."

In Chhetriya Pardushan Mukti Sangharsh Samiti v. State of U.P. and others, , the matter arose on violation of the provisions of the Air & Water (Prevention and Control of Pollution) Act. The Apex Court has observed as under :---

"Every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated by Article 21 of the Constitution of India. Anything which endangers or impairs by

conduct of anybody either in violation or in derogation of law, that quality of life and living by the people is entitled to (be taken) recourse of Article 32 of the Constitution."

In the case of Subhash Kumar v. State of Bihar and others, the question arose on account of pollution caused by discharge of slurry/sludge from a Steel Plant. While disposing of the petition the Apex Court observed as under :---

"Right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life."

15. In C.E.S.C. Limited and others v. Subhash Chandra Bose and others, the issue arose out of applicability of provisions of the Employees' State Insurance Act, 1948. While considering the ambit of Article 21 the Court also considered Article 25(2) of the Universal Declaration of Human Rights, 1948. While disposing of the petition, the Apex Court observed as under:---

"The right to social justice is a fundamental right. Right to livelihood springs from the right to life guaranteed under Article 21. The health and strength of a worker is an integral facet of right to life. The aid of fundamental rights is to create an egalitarian society to free all citizens from coercion or restrictions by society and to make liberty available for all. Right to human dignity, development of personality, social protection, right to rest and leisure as fundamental human rights to common man mean nothing more than the status without means.

To the tillers of the soil, wage earners, labourers, wood cutters, rickshaw pullers, scavengers and hut dwellers, the civil and political rights are 'mere cosmetic' rights. Socio-economic and cultural rights are their means and relevant to them to realise the basic aspirations of meaningful right to life. The Universal Declaration of Human Rights, International Convention of Economic. Social and Cultural Rights recognise their needs which include right to food, clothing, housing, education, right to work, leisure, fair wages, decent working conditions, social security, right to physical or mental health, protection of their families as integral part of the right to life. Our Constitution in the Preamble and Part IV reinforces them compendiously as socio-economic justice, a bedrock to an egalitarian social order. The right to social and economic justice is thus a fundamental right."

In Peerless General Finance and Investment Co. Ltd. and another v. Reserve Bank of India, the issue pertained to directions issued by the Reserve Bank of India to regulate several schemes run by what is known as Residuary Non-Banking Companies. While disposing of the petition the Apex Court observed as under:---

"The solidarity of political freedom hinges upon socio-economic democracy. The right to development is one of the most important facets of basic human rights. The right to self-interest is inherent in right to life. Mahatma Gandhiji, the Father of the Nation, said that "Every human being has a right to live and therefore to find the wherewithal to feed himself and where necessary, to clothe and house himself. Article 25 of the Universal Declaration of Human Rights provides that "everyone has a right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care. Right to life includes the right to live

with basic human dignity with necessities of life such as nutrition, clothing, food, shelter over the head, facilities for cultural and socio-economic well being of every individual. Article 21 protects right to life. It guarantees and derives therefrom the minimum of the needs of existence including better tomorrow."

In Surjit Singh v. State of Punjab & others, question arose of reimbursement of expenses for medical treatment. The Court while considering the case observed as under :---

"It is otherwise important to bear in mind that self-preservation of one's life is the necessary concomitant of the right to life enshrined in Article 21 of the Constitution of India, fundamental in nature, sacred, precious and inviolable. The importance and validity of the duty and right to self-preservation has a species in the right of self-defence in criminal law."

In Chameli Singh & others v. State of U.P. & another, 1996(2) S.C.C. 54 an issue arose out of acquisition of land for a public purpose. The Apex Court considering the scope and ambit of Article 21 observed as under :--

"In any organised society, right to live is a human being to not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object. Right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilised society. All civil, political, social and cultural rights enshrined in the Universal Declaration of Human Rights and Convention of under the Constitution of India cannot be exercised without these basic human rights. Shelter for a human being, therefore, is not a mere protection of his life and limb. It is home where he has opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter, therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads, etc. so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being. Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right. As it enjoined in the Directive Principles, the State should be deemed to be under an obligation to secure it for its citizens, of course subject to its economic budgeting. In a democratic society as a member of the organised civic community one should have permanent shelter so as to physically, mentally and intellectually equip oneself to improve his excellence as a useful citizen as enjoined in the Fundamental Duties and to be a useful citizen and equal participant in the democracy. The ultimate object of making a man equipped with a right to dignity of person and equality of status is to enable him to develop himself into a cultured being. Want of decent residence, therefore, frustrates the very object of the constitutional animation of right to equality, economic justice, fundamental right to residence, dignity of person and right to live itself."

In the case of People's Union for Civil Liberties (PUCL) v. Union of India and another, the issue arose as to the right of citizen to transmit telephone message or hold telephone conversation in

privacy. While disposing of the question the Court noted that :---

"India is a signatory to the International Covenant on Civil and Political Rights, 1966."

The Court then observed that Article 17 of the International Covenant does not go contrary to any part of our Municipal Law. Article 21 of the Constitution has, therefore, been interpreted in conformity with the International Law. Therefore, the Court spelt out that though International Covenant by themselves may not be enforceable in Municipal courts yet when they constitute a part of Article 21 and when there is no Municipal Law to the contrary the International Covenant can be resorted to.

In the case of M/s. Shantistar Builders v. Narayan Khimalal Totame and others, , certain lands were exempted under the provisions of the Urban Land (Ceiling & Regulation) Act, 1976 for construction of dwelling units under the scheme for weaker sections of the society. There was a ceiling in so far as income is concerned. The petitioners belong-

ing to weaker section of society filed a petition contending that the builder had violated the conditions imposed in the order of exemption. Various grounds were set out therein. The petition was dismissed as by then the Government Policy had changed. Without examining the factual aspects certain directions were given. It is against those directions that the builder challenged the order before the Apex Court. While disposing of the Special Leave Petition the Apex Court observed as under:---

"The right to life would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body, for a human being it has to be a suitable accommodation which would allow him to grow in every aspect physical, mental and intellectual. The Constitution aims at ensuring fuller development of every child. That would be possible only if the child is in a proper home. It is not necessary that every citizen must be ensured of living in a well-built comfortable house but a reasonable home particularly for people in India can even be mud-built thatched house or a mud-built fireproof accommodation."

16. In Unnikrishnan J.P. & others v. State of Andhra Pradesh and others, the question before the Apex Court was whether children aged upto 14 years have a fundamental right to education. The issue arose out of a judgment of the Apex Court in the case of Mohini Jain v. State of Karnataka . In Mohini Jain (supra) the issue was whether a citizen has a fundamental right to education in a Medical, Engineering or other professional Degree. The question whether the right to primary education as mentioned in Article 45 of the Constitution of India is a fundamental right under Article 21 did not directly arise in Mohini Jain's case. The correctness of the view taken in Mohini Jain's case was under issue before the Apex Court before a larger Bench. One of the contentions sought to be argued was that Article 37 of Part IV was not enforceable in the absence of any law and that, therefore, assuming the right under Article 45 is to be included within the ambit of Article 21 it would not be enforceable. Articles 45 and 49 were sought to be compared and it was suggested that

whereas in Article 49 there was an obligation placed on the State, under Article 45 what was required was an endeavour. The minority view took a stand that the issue as it did not squarely arise in the case need not be decided. The majority, however, proceeded to dispose of the said issue. The majority proceeded to answer the question as to why the Constitution did not positively confer a fundamental right to life or personal liberty like Article 19 but had couched it in negative language. The question was answered as under :---

"The reason is, great concepts like liberty and life were purposefully left to gather meaning from experience. They relate to the whole domain of social and economic fact. The drafters of this Constitution knew too well that only a stagnant society remains unchanged."

17. The Apex Court then proceeded to answer the interaction between fundamental rights and directive principles. The Court answered the question as under :---

"This Court has also been consistently adopting the approach that the fundamental rights and directive principles are supplementary and complementary to each other and that the provisions in Part III should be interpreted having regard to the Preamble and the Directive Principles of the State Policy. The initial hesitation to recognise the profound significance of Part IV has been given up long ago."

The Court further observed that :

"It is thus well established by the decisions of this Court that the provisions of Parts III and IV are supplementary and complementary to each other and that fundamental rights are but a means to achieve the goal indicated in Part IV. It is also held that the fundamental rights must be construed in the light of the directive principles."

An argument was raised that Article 21 is negative in character and that it merely declares that no person shall be deprived of his life or personal liberty and that since the State is not responsible for the right to education, Article 21 is not attracted and only in the event the State makes a Law taking away the right to education would Article 21 be attracted. The said argument was rejected by observing as under:---

"This argument, in our opinion, is really born of confusion; at any rate, it is designed to confuse the issue. The first question is whether the right to life guaranteed by Article 21 does take in the right to education or not. It is then that the second question arises whether the State is taking away that right. The mere fact that the State is not taking away the right as at present does not mean that right to education is not included within the right to life. The contents of the right is not determined by perception of threat. The content of right to life is not to be determined on the basis of existence or absence of threat of deprivation. The effect of holding that right to education is implicit in the right to life is that the State cannot deprive the citizen of his right to education except in accordance with the procedure prescribed by law."

majority view then held that the view taken in Mohini Jain (supra) that the right to education flows directly from right to life had been correctly answered. The Court, however, proceeded to answer as to how much and what level of education is necessary to make life meaningful? We are not actually concerned with that aspect of the matter.

Air India Statutory Corporation, etc. v. United Labour Union and others, etc., after reviewing the Preamble to the Constitution as explained in S.R. Bommai v. Union of India, and the amendment to the Preamble brought about by the 42nd (Amendment) Act and its effect on the directive principles of State Policy, the Apex Court laid down this proposition, which to my mind is fundamental for the purpose of deciding the issue herein. The Apex Court observed as under :---

"The directive principles in our Constitution are forerunners of the U.N.O. Convention on Right to Development as inalienable human right and every person and all people are entitled to participate in, contribute to and enjoy economic, social cultural and political development in which all human rights, fundamental freedoms would be fully realised. It is the responsibility of the State as well as the individuals, singly and collectively, for the development taking into account the need fuller responsibility for the human rights, fundamental freedoms as well as the duties to the community which alone can ensure free and complete fulfillment of the human being. They promote and protect and appropriate social and economic order in democracy for development. The State should provide facilities and opportunities to ensure develop-

ment and to eliminate all obstacles to development by appropriate economic and social reforms so as to eradicate all social injustice. These principle are imbedded, as stated earlier, as integral part of our Constitution in the Directive Principles. Therefore, the Directive Principles now stand elevated to inalienable fundamental human rights. Even they are justiciable by themselves."

While dealing with a similar issue which had arisen as here, a learned Single Judge of the Kerala High Court in the case of Philips Allred Malvin v. Y.J. Gonsalvis and others, has held that the right of the couple to adopt a son is a constitutional right guaranteed under Article 21 as the right to life includes those things which make life meaningful. The Court considered Canon Law as applicable to various denominations of Christians as also Mohammedan Law which recognised adoption if there is custom prevailing amongst the Mohammedan community. It is in that context that the Court held that the right of a couple to adopt a son is a constitutional right guaranteed under Article 21. However, there are no reasons to indicate how the Court has arrived at the conclusion except for quoting Article 21.

18. The judicial long march as a consequence has thrown out fossilised concepts and has breathed life into the Directive Principles by transplanting them into Fundamental Rights. The skeleton of Fundamental Rights has now flesh and blood and is clothed with the Preamble to the Constitution. It is ready to battle the forces of status quo, in search of social justice and as an upholder of human rights. It was Cardozo who stated "As statutes are designed to meet the fugitive exigencies of the hour..... A Constitution or a bill of rights - States or ought to state not rules for the passing hour, but principles for an expanding future". It is in that context that the expansion of judicial review must be understood within a broader constitutional setting. The explosion of regulatory power led to the

Courts coming to be regarded as a central part of a broader constitutional mechanism, securing responsible government. In this manner growth of review and the perception of the judicial function upon what it is founded, constituted a mature response to the changing needs of good governance. In developing the power of judicial review and to articulating the reading of the preamble and the directive principles, whilst interpreting the fundamental rights, has become a creative interpretative process in the field of public law. As the Lord Chancellor of England, Lord Irvine of Lairg, said in his 1999 Paul Sieghart Memorial Lecture and I quote :---

"When Scholars begin to write the legal history of the twentieth century they will need to allocate a considerable space for their chapter on Public Law. Judicial activism in the development of a mature system of public law is likely to come to count as the century's single greatest judicial achievement."

19. Let me now articulate this broad concept of life based on judicial precedents. Why does the right to life in the case of an abandoned orphan or destitute child includes the right to be taken in adoption. Precedent no doubt forms part of the rule of law. Article 141 has sanctified it, that the law laid down by the Apex Court is binding on all courts in India. The interpretation and application of precedent involves recourse to criteria of justice, developed in response to the fundamental requirement that law should reflect and embody an account of the common good. The equality secured by the application of precedent is ultimately therefore, an equality of common good. The process of interpretation and reinterpretation has evidenced a constituent tradition in the light of experience and changing values. Judges rely on precedent to buttress their conclusions. They have made use of precedent in extending the boundaries of social justice via the interpretative process. The new dimensions struck by the Apex Court in Unnikrishana (supra) and carried forward in Air India Statutory Authorities (supra) must help an activist judiciary committed to socio, economic and political justice to lead law into hereto unexplored areas. Lakshmi Kant Pandey is the high water mark in the development of the rights of the child. If an Indian child can be given to foreign adoptive parents irrespective of their religion, does the same child not have the right to be adopted in a home under Indian sky's. The directions issued by the Apex Court in Lakshmi Kant Pandey (supra) were in recognition of the right to life guaranteed under Article 21 to the child. In the absence of adoption being a part of the right to life the Court could not have proceeded to issue the said directions. In Shanti Star (supra) the Court recognised the right of housing as a fundamental right in order to ensure a fuller development of every child. That would be possible, the Court said, if the child is in a proper home. The right of the child to education upto the age of 14 has been accepted as a part of his fundamental right to life. In Air India Statutory Corporation (supra) the Apex Court said that the directive principles now stand elevated to inalienable fundamental human rights. They are even justiciable by themselves. In Unnikrishnan (supra) no doubt the Court tested the right to life to make it meaningful within the economic capacity of the State. In other words though the directive principles were read into the chapter on fundamental rights nevertheless the Court hastened to add that it should be within the economic capacity of the State. What emerges is that the directive principles now are read as a part of the right to life subject to the economic capacity of the State. In the case of adoption there is no economic burden cast on the State. The economic capacity of the State is not in issue. The simple and short issue is the right of the child to be taken in adoption by willing parents without the State having to bear any economic burden. Once the economic aspect and the burden on the State is discharged the Article 21 must stand tall and reach to Article 39(f) of

the Constitution. So read the right of the child to be adopted and consequently to have a home, a name and a nationality has to be considered as part of his right to life.

IV. INTERNATIONAL COVENANTS AND THEIR ENFORCEABILITY BY MUNICIPAL COURTS:

20. Article 39(f) was introduced by the Constitution (Forty-second Amendment) Act, 1976 with effect from 3rd January, 1977. The said Article reads as under:---

"39(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."

The need for this Article, it may be pointed out has arisen because India is a Signatory to various International Conventions pertaining to child and child welfare. We may now refer to these various International Conventions. The first in point of time is the Universal Declaration of Human Rights to which India is a Signatory. We are concerned with Articles 161 and 163 which read as under :---

" 1. Men and Women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. .....

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

Article 252 reads as under :---

"2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out or wedlock, shall enjoy the same social protection.

We then have the declaration of the rights of the child which was proclaimed by General Assembly Resolution No. 1386 (XIV) of 20th November, 1959. The relevant provisions are Principle No. 3 which reads as under:-

"3. The child shall be entitled from his birth to a name and a nationality."

Principle No. 6, reads as under :---

"6. The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case in any atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family

and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable."

relevant part of Principle No. 7 which is important is as under:---

"The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents."

The declaration of the rights of the child was satisfies by India on 2nd December, 1999.

We then have the International Covenant on Economic, Social and Cultural Rights was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A(XXI) of 16th December, 1966. The relevant portions are Article 10, which reads as under :---

"The States Parties to the present Covenant recognized that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. .....

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law."

We then have then the Declaration on Social and Legal Principles relating to Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally. The relevant Articles would be as under :---

Article 3: The first priority for a child is to be cared for by his or her own parents.

Article 4: When care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute-foster or adoptive-family or, if necessary, by an appropriate institution should be considered.

Article 13: The primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family.

The Convention on the Rights of the Child was adopted and ratified by India on 20th November, 1989. The Preamble to this covenant has referred to various other declarations and conventions in regard to the child. The relevant Articles are as under :---

"Article 20.---1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their National Laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, Kafala in Islamic law, adoption or if necessary placement in suitable institutions care of children. When considering solutions, due regard shall be paid desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21: States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

.....

Article 36: State Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

These no doubt are International Conventions. The State has yet to frame laws in terms of the aforesaid International Conventions though it has ratified the conventions. Law pertaining to Adoption has been enacted for a section of the Society consisting of certain religious groups.

21. The question is whether the courts can enforce these treaties/conventions without they forming a part of Municipal Law. We need not debate much on the issue as the Apex Court has in so many words now said that even though there is no Municipal Law, if those rights form a part of the fundamental rights under Chapter III and/or they are not in conflict with the Municipal law they can be enforced in the National courts. The earliest judgment was in the case of Jolly George Verghese and another v. State Bank of Cochin, . In that case the judgment debtor was sought to be imprisoned for failure to pay the moneys under a decree. After passing of the decree he had no means to pay. The Civil Procedure Code provides for detaining of such a person in Civil prison for a period as set out in the Code of Civil Procedure. Krishna Iyer, J., speaking for the Apex Court referred to the Universal Declaration of Human Rights. The learned Judge held that India being a signatory to the said declaration no person could to be deprived of his life or liberty if he had no means to pay. In other words though the Municipal Law provided that on failure to satisfy the decree in execution the Court may commit the judgment debtor to Civil prison. Nonetheless no man could be deprived of his liberty without the due process of law. If the man had no means of paying, his right to liberty could not be denied considering the Universal Declaration of Human Rights and as such it was not in conflict with the Municipal Law. The said declaration should be read as a part

of the Municipal Law and be enforceable by the National Court.

In the case of Gramophone Company of India Ltd. v. Birendra Bahadur Pandey and others, the issue arose of transit of goods from India to Nepal pursuant to a Treaty between India and Nepal providing a corridor for the transport of goods. Various Municipal Acts were under consideration along with the Treaty between the two countries and International Convention. The Court posed two questions (1) whether the International Law is, of its own force, drawn into the law of the land without the aid of a municipal statute and (2) whether so drawn, it overrides Municipal Law in case of conflict. The Apex Court relied on various International Covenants as well as the law as expanded by other National Courts. The Apex Court then proceeded to answer the question as under :---

"There can be no question that nations must march with the international community and the Municipal Law must respect rules of International Law even as nations respect international opinion. The comity of Nations requires that rules of International Law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Act of Parliament."

However, in the event when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subject to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The Apex Court then went on to observe as under :---

"The doctrine of incorporation also recognises the position that the rules of International Law are incorporated into National Law and considered to be part of the National Law, unless they are in conflict with an Act of Parliament. Comity of nations or no, Municipal Law must prevail in case of conflict. National Courts cannot say "yes" if Parliament has said no to a principle of International Law. National Courts will endorse International Law but not if it conflicts with National Law. National Courts being organs of the National State and not organs of International Law must perforce apply National Law if International Law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the Municipal Statute as to avoid confrontation with the comity of Nations or the well established principles of International Law. But if conflict is inevitable, the latter must yield."

The question came up again before the Apex Court in the case of People's Union for Civil Liberties v. Union of India & another, . The matter arose before the Apex Court out of a petition filed by the petitioners in a matter of what is known as fake encounter. The question again was whether the International Covenants to which India was a party could be enforced and/or relied upon. The Court observed that in Nilabati Behera v. State of Orissa, , the Court had held that award of compensation in a proceeding under Article 32 by the Supreme Court or under Article 226 by the High Court is a remedy available in public law based on strict liability for contravention of fundamental rights. The Court posed the question as to whether the reference to and reliance upon Article 9(5) of the International Covenant on Civil and Political Rights, 1966 in Nilabati Behra (supra) raises an interesting question, viz. to what extent can the provisions of such international covenants/conventions be read into National Laws. The Court noted a decision of the Australia High

Court, Minister for Immigration and Ethnic Affairs v. Teoh., 1995(69) Aus.L. J. 423. After discussing the said judgment at length the Court proceeded to answer as under:---

"For the present, it would suffice to state that the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such."

22. In the case of Vishaka and others v. State of Rajasthan & others, the question was of sexual harassment of working woman at work places. The question before the Apex Court was as to what would be the position in law if there was no law for effective enforcement. In that case the Supreme Court exercised its powers under Article 32 and laid down guidelines and directed that the same be treated as law declared under Article 141. In so far as absence of Municipal Law the Court observed as under: -

"In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein." Any International Convention not-inconsistent with the fundamental rights and in harmony with its spirity must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and the enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make law. The executive power of the Union is, therefore, available till the Parliament enacts legislation to expressly provide measures needed to curb the evil."

The Court then proceeded to further observe as under:---

"The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the filed when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law."

The Apex Court then observed that :---

"The High Court of Australia in Minister for Immigration and Ethnic Affairs v. Teoh., 128 A.L.R. 353, has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia."

The Apex Court then said that there is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity. The Court then proceeded to lay down certain guidelines to effectuate what they held.

In the case of Gita Hariharan v. Reserve Bank of India, the question before the Apex Court was of construction of section 6-A of the Hindu Minority and Guardianship Act. The Court was considering section 6, which reads as under :--

"The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property) are

(a) in case of a boy or an unmarried girl the father and after him the mother: Provided that the custody of a minor who has not completed the age of five years shall ordinary be with the mother."

The question before the Court was as to what is the meaning of the word "after" in the aforesaid sub-section. The Court noted that the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 and the Beijing Declaration, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women is quite clear. India is a signatory to the said Convention. The Court noted that the International Covenants could be the Rule to give true effect to the Municipal Law and then proceeded to answer that the word "after" is in a case where the father is not in actual charge of the affairs of the minor either because of his indifference or because of any agreement between him and the mother of the minor (oral or written} and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother, can act as natural guardian. This the Court held would be the law correctly read keeping in mind. International Conventions and non-arbitrariness.

From these line of judgments, therefore, it is clear that when there are International Covenants to which India is a Signatory and even though there is no Municipal Law or if there is Municipal Law when such covenants are not in conflict with the Municipal law they can be read to give effect to what is explicit in Part III of the Constitution.

23. The enforcement of International Covenants by the Executive in the absence of Legislation had come up for consideration before the Apex Court in the case of Maganbhai Ishwarbhai Patel v. Union of India & another, . The issue before the Apex Court was of handing over Indian territory to Pakistan pursuant to the Indo-Pakistan Western Boundary Case Tribunal award dated 19th February, 1968 in Rann of Kutch. No law was enacted by Parliament to give effect to the Award. The Apex Court yet upheld the right of the Executive to surrender the territory without any Act of Parliament in order to give effect to International Treaties and Obligations. The Apex Court has observed as under :--

"Our Constitution makes no provision making legislation a condition of the entry into an international treaty in times either of war or peace. The executive power of the Union is vested in the

President and is exercisable in accordance with the Constitution. The executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in International Law are binding upon the State. But the obligations arising under the agreement or treaties are not their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty."

V. EXECUTIVE POWER OF THE UNION AND THE STATES:

24. The Executive power of the Union is as set out in Article 73 of the Constitution of Indi

We may now trace the content and extent of the Executive power as explained by the Apex Court itself. In Rai Sahib Ram Jawaya Kapur and others v. The State of Punjab, , the question arose as to what exactly was an Executive function. While deciding the said issue the Apex Court observed that it may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. Explaining further the Court observed that neither Articles 162 and 73 contain any definition as to what the executive function is and what activities would legitimately come within its scope. Interpreting Articles 162 and 73 the Court observed that they are concerned primarily with the distribution of the executive power between the Union on the one hand arid the States on the other. They do not mean that it is only when the Parliamentary or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of Article 162 clearly indicates that the powers of the State executive do extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. Comparing our Constitution with the British Parliamentary System the Court observed that though our Constitution is federal in its structure, it is modelled on the British Parliamentary system where the executive is deemed to have the primarily responsibility for the formulation of governmental policy and its transmission into law, though the condition precedent to the exercise of this responsibility is retaining the confidence of the legislative branch of the State. The executive functioning comprises both the determination of the policy as well as carrying in into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.

The matter was further explained in Samsher Singh v. State of Punjab, . Construing similar and some other provisions of the Constitution, the Apex Court reiterated that executive power is generally described as the residue which does not fall within the legislative or judicial power. But

executive power may also partake of legislative or judicial actions. All powers and functions of the President except his legislative powers as for example in Article 123, viz. ordinance making power, and all powers and functions of the Governor except his legislative power as for example in Article 213, being ordinance making powers are executive powers of the Union vested in the President under Article 53(1) in one case and are executive powers of the State vested in the Governor under Article 154(1) in the other case. Clause (2) or Clause (3) of Article 77 is not limited in its operation to the executive action of the Government of India under Clause (1) of Article 77. Similarly, Clause (2) or Clause (3) of Article 166 is not limited in its operation to the executive action of the Government of the State under Clause (1) of Article 166. The expression "Business of the Government of India" in Clause (3) of Article 77, and the expression. "Business of the Government of the State" in Clause (3) of Article 166 includes all executive business.

In J.R. Raghupathy etc. v. State of A.P. and others, the Apex Court was considering whether prerogative powers of the Crown in England are akin to the executive function of Union and State under Article 73 and 162 of the Constitution. The Court did not pass any final pronouncement but prima facie observed that executive powers of the Union and the States under Articles 73 and 162 are much wider than the prerogative powers in England. Reliance was placed on some judgments in furtherance of that prima facie view.

25. From a perusal of the constitutional provisions and their interpretation by the Apex Court, it is clear that the Executive Power of the State is co-extensive with the Legislative power. It does not require legislation for the State to exercise its executive power. It is independent of the legislative functions. It is resorted to either in the absence of legislation or to fill in gaps on which legislation is silent.

In Madhu Kishwar and others v. State of Bihar & others, , a case of legislative and executive action while considering the directive principles, the Court observed as under :---

"Legislative and executive actions must be conformable to, and effectuation of the fundamental rights guaranteed in Part III and the directive principles enshrined in Part IV and the Preamble of the Constitution which constitute the conscience of the Constitution. Covenants of the United Nations add impetus and urgency to eliminate gender-based obstacles and discrimination. Legislative action should be devised suitably to constitute economic empowerment of women in socio-economic restructure for establishing egalitarian social order. Law is an instrument of social change as well as the defender of social change. Article 2(e) of CEDAW enjoins this Court to breathe life into the dry bones of the Constitution, international conventions and the Protection of Human Rights Act, to prevent gender-based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights."

VI. ROLE OF THE JUDICIARY IN INTERPRETING PART HI AND PART IV OF THE CONSTITUTION.

26. Let us, now examine the role of the judiciary in this country in shaping what may be descri

In State of Karnataka v. Appa Balu Ingale & others, 1995(4) S.C.C. 469 the issue before the Apex Court where the complaints by Harijans against the respondent who by use of force were threatened them from taking water from a newly dug up borewell. The Court there was considering the judgment of the Court to shape progress of law and to recognise changing conceptions of social values and having regard to public policy of law as determined by new conditions. Explaining the role of the Judge- The Apex Court observed as under:-

"The Judge must be attune with the spirit of his/her times. Power of judicial review, a constituent power has, therefore, been conferred upon the judiciary which constitutes one of the most legal or constitutional rights. The judges are participants in the living stream of national life, steering the law between the dangers of rigidity on the one hand and formlessness on the other hand in the seamless web of the life. The great tides and currents which engulf the rest of the men do not turn aside in their course and pass the judges idly by. Law should subserve social purpose. Judge must be a jurist endowed with the legislator's wisdom, historian's search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future and to decide objectively disengaging himself/herself from every personal influence or predilections. Therefore, the judges should adopt purposive interpretation of the dynamic concepts of the Constitution and the Act with its interpretative armoury to articulate the felt necessities of the time."

The Court then further went on to observe as under :---

"Public policy of law, as determined by new conditions, would enable the courts to recast the changing conceptions of social values of yester years yielding place to the changed conditions and environment to the common good. The courts are to search for light from among the social elements of every kind that are the living force behind the factors they deal with. By judicial review, the glorious contents and the trite realisation in the Constitutional words of width must be made vocal and audible giving them continuity of life, expression and force when they might otherwise be forgotten or ignored in the heat of the moment or under say of passions or emotions remain aroused, that the rational faculties get befogged and the people are addicted to take immediate for eternal, the transitory for the permanent and the ephemeral for the timeless. It is in such surging situation the presence of consciousness and the restraining external force by judicial review ensures stability and progress of the society. Judiciary does not forsake the ideals enshrined in the Constitution, but makes them meaningful and makes the people realise and enjoy the rights."

In Madhu Kishwar and others v. State of Bihar & others (supra) the issue before the Apex Court was the matter of rights of Scheduled Tribes women as Tribal Law to succession. The Apex Court therein observed that the custom though given status of law under Article 13(3)(a), should not be inconsistent with the fundamental right of the tribal women. Examining the purposeful role cautioning the courts of what is described as Judge made amendments, the Court observed as under :---

"Judge-made amendments to provisions, over and above the available legislation, should normally be avoided. In the face of the divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of

personal law applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-bogging effort. An activist Court is not fully equipped to cope with the details and intricacies of the legislative subject and can at best advise and focus attention on the State policy on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. For in whatever measure be the concern of the Court, it compulsively needs to apply, somewhere and at sometime, brakes to its self-motion, described in judicial parlance as self-restraint."

In Air India Statutory Corporation etc. (supra) the Apex Court observed as under :---

"Constitutional issues require interpretation broadly not by play for words or without the acceptance of the line of their growth. Preamble of the Constitution, as its intergral part, is designed to realise socio economic justice to all people including workmen, harmoniously blending the details enumerated in the Fundamental Rights and the Directive Principles."

The Court then further observed as under :---

"Article 39-A furnishes beacon light that justice be done on the basis of equal opportunity and no one be denied justice be reason of economic or other disabilities. Court are sentinel in the qui vive of the rights of the people, in particular the poor. The judicial function of a Court, therefore, in interpreting the Constitution and the provisions of the Act, requires to build up continuity of socio-economic empowerment to the poor to sustain equality of opportunity and status and the law should constantly meet the needs and aspiration of the society in establishing the egalitarian social order. Therefore, the concepts engrafted in the statute require interpretation from that perspectives, without doing violence to the language. Such an interpretation would elongate the spirit and purpose of the Constitution and make the aforesaid rights to the workmen a reality lest establishment of an egalitarian social order would be frustrated and Constitutional goal defeated."

VII. THE JUDGE AS A LEGISLATOR:

27. I need not dwell at length on this aspect, as the Apex Court in various judgments even in the absence of statute or otherwise has been issuing directions. Let me only refer to recent pronouncements beginning with the case of D.K. Basu, which principles were reiterated in Dilip K. Basu v. State of West Bengal and others, . Similar directions in the matter of women involved in prostitution and for their rescue and rehabilitation have been given in Gaurav Jain v. Union of India and others, . In Vishaka and others (supra) the Apex Court has been pleased relying on International Conventions and has issued directions against harassment of women at work places, etc. and declared it as the law under Article 141. Article 141 has been final.

It is thus seen that in the absence of legislation and where fundamental rights are involved courts have refused to remain silent spectators. The interpretative process coupled with International Convenants have been resorted to while issuing directions.

VIII. CUSTOM AS A SOURCE OF LAW:

28. Article 13(3)(a) of the Constitution of India reads as under:---

"13(3)(a("law" includes any Ordinance, order, bye-law, rule regulation, notification, custom or usage having in the territory of India the force of law."

Under Article 13(1) all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III, shall, to the extent of such inconsistency, be void. Before enacting the Hindu Adoptions and Maintenance Act, 1956 adoption was recognised amongst Hindus as a custom. I need not dwell at length on that aspect as that is not an issue and discussion on the same is not required for the purpose of disposing of the issues arising herein. On the coming into force of the Hindu Adoptions & Maintenance Act, 1956 by virtue of section 2, the Act is made applicable to any person (a) who is a Hindu by religion in any of its forms; (b) to any person who is a Buddhist, Jaina or Sikh by religion and (c) to any other person who is not a Muslim, Christian, Parsi or jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed. In other words in so far as Buddhist, Jaina and Sikh are concerned they have been brought within the ambit of the said Act.

Customary Law has assumed that there are no such customs prevalent amongst those professing Muslim, Christian, Parsi or Jewish faiths. By virtue of Article 25, subject to public order, morality and health and to the other provisions of Part III, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. In this Article also for the purpose of sub-clause (2)(b) the word "Hindu" is construed as a reference to persons to profess Sikh, Jaina and Buddhist and reference to Hindu Religious Institutions are to be construed accordingly. Article 25(2)(b) is the provision providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. In other words Article 25 permits citizens subject to what is aforestated to freely profess, practise and propagate religion. Practise of religion within its ambit will also include the right to personal laws, if the source of law is religion itself. However, again such a law or religious belief is subject to public order, morality and health and other provisions of the Constitution. Further this would include Article 13 and any law including Customs which is inconsistent with the provisions of Part III to the extent of such inconsistency are void.

In Akbarally A. Adamji Peerbhoy v. Mohamedally Adamji Peerbhoy, 34 Bom.L.R. 655 a Division Bench of this Court was considering the Customs and Usages amongst those professing Mahomedan faith. The Court observed that considering the provisions of the Government of India Act the Court perhaps seek indirect light from the injunction that "the law of the Koran with respect of Mohammedans shall be invariably" adhered to": and that the rules and orders shall be so framed by the Court as to be most consonant to the religions and manners and law and usages of the parties. The Court then observed that the Privy Council has laid down that customs in derogation of the law of Islam ought to be allowed to be proved even in cases governed by an enactment to the imperative effect that the rule of decision shall be the Muhammadan law. The Court observed as under :---

"The reasons seems to be that in regard to such questions, there being no established Islamic religion in India, the courts cannot determine that a particular exposition of Muhammadan Law is correct to the exclusion of all these; but justice, equity and good conscience require the application of that law which the parties as a matter of fact by their customs and usages have adopted, not the law which the courts by a consideration of the historical circumstances relating to the parties or of their religious books, or otherwise consider to be the law that they ought to have adopted: Kojas and Memons' case."

In an Article 'Adoption on Muslim Law' on introduction in the Rajya Sabha of "Adoption of Children Bill", Danial Latifi had written an Article. He observed that the Holy Quran has placed two restrictions on adoption or, more precisely, on the effects of adoption and the second Lineage. The learned Lawyer has quoted the relevant text from the Quran which may be reproduced as under :---

"Ud'uhum li abaibhim hua aqsatu 'inda' Allahi fa in lam ta 'lamu abauhum".

(Call adopted sons by the names of their father: that is more just in the sight of God, unless you do not know their fathers).

This article was contributed for the purpose of suggestion that possibly there is no total ban on adoption and by bringing in some amendments it could be brought in conformity to what is contained in the Holy Qur'an.

In so far as Christians are concerned, as I have already set out earlier that Bible itself shows that adoption was being practised.

I have referred to the above for the purpose of finding out the position on the coming into force of the Constitution of India and more specifically Part III and, considering Article 13. If Article 13 has to be read in respect of the law of customs or usage what becomes apparent is that the law must be in conformity with the principles contained in Part III of the Constitution. If the law is violative of the principles contained in Part III then such a law will be void. In Unnikrishnan (supra) the Apex Court has given a new direction to the interpretation of the fundamental right when it said that the effect of holding that the right to education is implicit in the right to life is that the State cannot deprive the citizen of his right to education except in accordance with the procedure prescribed by law. In other words the Court has held that the right to education forms a part of the right to life and as such is enforceable. It is not that, therefore, the State must enact a legislation to give effect to the fundamental rights. On the contrary the fundamental right itself confers a right on the child, to education. If this be the interpretation given to Article 21 then while holding that personal customs and usages are protected by Part III, what in fact must be held is that there is a right in the child to be adopted and it is on account of that right that the right of the Hindu to adopt has been held not to be inconsistent with Part HI of the Constitution. If so read the right to life becomes a fountain head in so far as adoption is concerned. Therefore, custom must be in conformity with Part III. It cannot be opposed to Part HI. If that be so, the adoption of a child will flow from Part III of the Constitution more specifically Article 21. Custom amongst Hindus after the coining into force of the Constitution has a secondary rote. This is because 'adoption' as a custom amongst Hindus before the Hindu

Adoption and Maintenance Act was restrictive. It could be, therefore, supported by Article 25. However, after the coming into force of 'The Hindu Adoption & Maintenance Act' adoption is not restricted to custom only, it is much wider. This part of adoption, therefore, can only be traceable to Article 21. Custom must confirm to Part III and not the other way. In so far as the adoptive parents are concerned, it flows from the right of such parents from Article 14 of the Constitution of India even amongst those couples whose belief or customs do not provide for adoption. They cannot be discriminated from adopting a child without the State being accused of arbitrariness and infracting Article 14 of the Constitution. Once a couple is permitted under the Guardians and Wards Act of being capable of taking a child in guardianship the consequence must follow that the legal guardian can move the Court for adoption of the child in order to fulfill the constitutional objective of such a child to have a home, a name and a nationality. The Court no doubt has strayed into the area of personal law in what I may describe as the post adoption stage. Though adoption by itself is a fundamental right of an orphaned, abandoned or destitute child, the legal consequence of being given in adoption will entail application of Family Law or what we term as Personal law. This to my mind will not have the effect on the rights of any citizen to profess his religion guaranteed under Article 25 of the Constitution. The Special Marriage Act is in force. Any citizen of the country can marry under the said Act. Marriages and Divorce of those who marry under the said Act are governed by the said Act. Succession by the Indian Succession Act. People professing different faiths marry under that said Act. The vision of the new millennium must guide our religious leaders. Their broad vision can lead their flock to understand religions, as the founders of Religions would have wanted their followers to follow, love and tolerance must be the cornerstone. Religious teachings must undergo the same interpretative processes much as Judges to through for finding answers to justice social, economic and political.

IX. COMMON CIVIL CODE AND THE RIGHT TO ADOPT:

29. Article 44 of the Constitution enjoins that the State shall endeavour to secure for the citizens a uniform Civil Code throughout the territory of India. A section of public opinion on this aspect has been more vocal specific after the judgment of the Apex Court in Smt Sarla Mudgal v. Union of India, , wherein the learned Judge speaking for the Bench has observed as under :---

"One wonders how long will it take for the Government of the day to implement the mandate of the framers of the Constitution under Article 44 of the Constitution of India. The traditional Hindu law personal law of the Hindus governing inheritance, succession and marriage was given go-bye as back as 1955-56 by codifying the same. There is no justification whatsoever in delaying indefinitely the introduction of a uniform personal law in the country."

In y. Narasimha Rao & others v. Y. Venkata Lakshmi & another, 1991 S.C.C. 451, another Bench of the Apex Court observed as under:---

"In matters of status or legal capacity of natural persons, matrimonial disputes, custody of children, adoption, testamentary and intestate succession, etc. the problem in this country is complicated by the fact that there exist different personal laws and no uniform rule can be laid down for all citizens. The distinction between matters which concern personal and family affairs and those which concern

commercial relationship, Civil wrongs, etc. is well recognised in other countries and legal system. The law in the former area tends to be primarily determined and influenced by social, moral and religious consideration, and public policy plays a special and important role in shaping it. Hence, in almost all the countries the jurisdictional, procedural and substantive rules which are applied to disputes arising in this area are significantly different from those applied to claims in other area. This is as it ought to be. For, no country can afford to sacrifice its internal unity, stability and tranquillity for the sake of uniformity of rules and comity of nations which considerations are important and appropriate to facilitate international trade, commerce, industry, communication, transport, exchange of services, technology, manpower etc."

In Madhu Kishwar & others (supra) the issue before the Apex Court was whether the personal laws applicable to Hindus should be extended to the Scheduled Tribes. One of them pertained to the provisions pertaining to succession. The Court noted that neither the Hindu Succession Act nor even the Shariat Law is applicable to the custom-governed tribals. The Court observed as under : ---

"In the face of these divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a different and mind-boggling effort. Brother K. Ramaswamy, J., seems to have taken the view that Indian legislature (and Governments too) would not prompt themselves to activate in this direction because of political reasons and in this situation, an activist Court, apolitical as it avowedly is, could get into action and legislate broadly on the lines as suggested by the petitioners in their written submissions. However, laudable, desirable and attractive the result may seem, it has happily been viewed by our learned brother that an activist Court is not fully equipped to cope with the details and intricacies of the legislative subject and can at best advise and focus attention on the State policy on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. For in whatever measure be the concern of the Court, it compulsively needs to apply, somewhere and at sometime, brakes to its self-motion, described in judicial parlance as self restraint."

Reference has been made to these judgments on account of a peculiar line of thinking, that the unity of the nation itself is at stake if there is no common Civil Code, in so far as personal law is concerned. While Sarla Mudgal has become the chorus of a determinate section, the voice of reason reflected in Y. Narsimha Rao (supra) and in Madhu Kishwar is sought to be glossed over of forgotten. In the distant past the Bar Council of India on the occasion of its Silver Jubilee had presented a report and a plan of action on the Common Civil Code. The Common Civil Code proposed was in respect only of personal laws. I have had occasions also to consider Articles supporting Common Civil Code written by various distinguished Judges. In an article published in the Radical Humanist of March, 1997 under the heading Personal Law Reform in Human Rights Perspective by Iqbal A. Ansari. The learned Author observed as under :---

"Let rights oriented people who are genuinely interested in improving human condition, work for sociological reform while warning the wider citizenry of the counter-productiveness of the politics of Personal Law, entering round U.C.C."

In the Constituent Assembly Debates when Article 35 now Article 44 was being debated, Shri Alladi Krishnaswami Ayyar was pleased to observe as under:---

"The Civil Code, as has been pointed out, runs into every department of civil relations, to the law of contracts, to the law of property, to the law of succession, to the law of marriage and similar matters. How can there be any objection to the general statement here that the States shall endeavour to secure a uniform Civil Code throughout the territory of India?"

He thereafter observed as under:---

"The future Legislatures may attempt to uniform Civil Code or they may not. The uniform Civil Code will run into every aspect of Civil Law. In regard to contracts, procedure and property uniformity is sought to be secured by their finding a place in the Concurrent List. In respect of these matters the greatest contribution of British jurisprudence has been to bring about a uniformity in these matters."

Dr. B.R. Ambedkar, while replying to various proposed amendments observed as under:---

"Now I must confess that I was very much surprised at that statement, for the simple reason that we have in this country a uniform Code of laws covering almost every aspect of human relationship. We have a uniform and complete Criminal Code operating throughout the country, which is contained in the Penal Code and the Criminal Procedure Code. We have the Law of Transfer of Property, which deals with property relations and which is operative throughout the country. Then there are the Negotiable Instruments Act: and I can cite innumerable enactments which would prove that this country has practically a Civil Code, uniform in its content and applicable to the whole of the country. The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this later corner which we have not been able to invade so far and it is the intention of those who desire to have Article 35 as part of the Constitution to bring about that change. Therefore, the argument whether we should attempt such a thing seems to me somewhat misplaced for the simple reason that we have, as a matter of fact, covered the whole lot of the field which is covered by a uniform Civil Code in this country. It is therefore too late now to ask the question whether we could do it. As I say, we have already done it."

30. Those who see urgency in enacting the Common Civil Code, perhaps have forgotten that there is already an enactment known as The Special Marriage Act' which covers both marriage and succession. That Act is applicable to all citizens. That is what Dr. Ambedkar had aspired for in the Constituent Assembly and it has been done. However, its application is voluntary and not applicable as a matter of course. What the die hards contend is that even if the pluralistic character of our society is not unanimous today in favour of a Common Civil Code, the absence of Common Civil Code jeopardises the unity and integrity of the nation. Whilst stressing on the aspect of Article 44, nobody seems to be interested in Article 41 which provides that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want or for that matter Article 35 and 39. Force on the citizens

common personal law. What does it matter if they have no shelter, food or education. I have referred to these aspects as in the earlier part of the judgment. I have referred to various bills tabled in Parliament which have not seen the light of the day on account of so called opposition based on personal law. Similarly, the Bill passed by the Maharashtra Legislative Assembly is pending assent of the President of India on account of various objections raised. Intolerance towards the view of other seems to be the meeting point, where respective sides can unsheath their swords. The voice of reason is lost in the dead dreary sand of habit. That this nation was born out of Revolutionary changes and its future lies in respecting the view of the other is forgotten.

My attempt in referring to the uniform Civil Code is to point out that the right of such child to be adopted, is not pursuant to any personal law. The right of the child is independent, as a human being, and flows from his right to life as contained in Article 21 of the Constitution. Any eligible parent or parents irrespective of religion can apply to adopt a child. Personal laws, as pointed out earlier, have to meet the test of Part III of the Constitution, if they are to be saved. Customs and usage amongst Hindus provided for adoption as a custom, but it was restrictive. On the coming into force of the Constitution it is Article 21 in which the rights of the child are cradled. Custom has given way to Article 21. The case I have made out is that the right of adoption after coming into force of the Constitution is not referable to any customary or personal right. It is now impregnated in Article 21. Its flow now is sustained from the Republican Constitution and not age old Customs.

X. CONCEPT OF PARENS PATRIAE:

31. Clause 17 of the amended Letters Patent of the High Court of judicature for the Presidency of Bombay reads as under :---

"And we do further ordain that the said High Court of Judicature at Bombay shall have the life power and authority with respect to the person and estate of infants, idiots and lunatics, within the Bombay Presidency, as that which was vested in the said High Court immediately before the publication of these presents."

Prior to the Letters Patent of 1865 the jurisdiction and powers of the High Court were defined by the Letters Patent of 1862. Under Clause 16 of the Letters Patent 1862, it was provided that the High Court shall have the "like power and authority with respect to the persons and estates of infants, idiots and lunatics, whether within or without the Presidency of Bombay as that which is now vested in the said Supreme Court at Bombay." The Supreme Court of Bombay came to be abolished by operation of section 8 of the High Court of Judicature Act, 1861 which provided that upon the establishment of a High Court in the presidency of Bombay, the Supreme Court, the Sudder Dewani Adalat and the Sudder Foujdarry Adalat shall stand abolished. The jurisdiction and powers of the erstwhile Supreme Court of Bombay were defined by the provisions of the Letters Patent of the Supreme Court, 1823. Clause 37 of the said Letters Patent authorised the Supreme Court, inter alia, "to appoint guardians and keepers for infants and their estates, according to the order and course observed in that part of Great Britain called England. Under the English common law, the father as patraie potestas enjoyed rights akin to property ones over his children to the exclusion of all others including the natural mother. However, the rights of the father in the common law were tempered

by the intervention of equity. The prerogative of the crown as parens patriae to exercise supervisory powers over those having guardianship and custody of minor children was enjoyed by the Lord Chancellor, until the assumption of these powers by the Court of Wards set up in 1540 by 32 Hen 8, C-46. The Court of Wards was in turn abolished by the Tenures Abolition Act. 1660 and the power to appoint guardians of the person of infants was assumed by the Court of Chancery and thereafter, by Chancery Division of the High Court under the Judicature Acts of 1873 and 1875. However, there does not appear to have been a recognition in either law or equity of a power in any judicial body or the Lord Chancellor to give an infant in adoption. At common law, the rights, liabilities and duties of parents are inalienable and adoption in the sense of a transfer of parental rights and duties in respect of a child to another person is unknown, (See Poole v. Stokes), 1914-15 All.E.R. 1083, Brooks v. Blount, 1923(1) KB 257, Humphreys v. Polak, 1901(2) K.B. 385. In equity, it was possible for a relative or stranger to put himself in loco parentis to assume the fiduciary position of a father in relation to a child and undertakes the obligation to make provision of the child, (See Powys v. Mansfield), 1904(40) E.R. (Chancery) 964. However, de facto assumption of parental rights did not amount to a vesting of parental rights and duties in those who put themselves in loco parentis. It was only with the passing of the Adoption of Children Act, 1926 that adoption received legal recognition for the first time in England so as to irrevocably vest parental rights and duties in adoptive parents. In view of the position that English law did not recognise adoption or the power of courts to give in adoption in 1823 when the Supreme Court to be established, it follows that the Supreme Court and by derivation the High Court of Bombay has no power to give a minor child in adoption. It does however, have a guardianship jurisdiction by the power to appoint "guardians and keepers" of infants.

32. The exercise of power of parens patriae is the exercise of the power of the sovereign. These powers were to be exercised by the Lord Chancellor, afterwards by the Court of Chancery by virtue of Clause 17. That power has been conferred on this High Court and under the Rules framed these powers are exercised by the Chamber Judge appointed to dispose of Chamber matters. The law in so far as parens patriae in India is concerned is enunciated in Ramaji Adaji Pagi, A.I.R. 1941 Bom. 397, in Budhkaran Chaukhani and others v. Thakur Prasad Shah & another A.I.R. 1942 Calcutta 322, Banku Behary Mondal v. Banku Behary Hazra and another and in the matter of A.T. Vasudeuan & others A.I.R. 1949 Madras 260. This concept of parens patriae has also been considered by the Supreme Court of the United States in the matter of State of Georgia v. Tennessee Copper Company, 1906 200 U.S. 230 and in Alfred L. Snapp & Co. INC v. Puerto Rico, 458 US 592. Our Apex Court had an occasion to refer to this doctrine in the case of Charan Lal Sahu v. Union of India, in what is known as the Bhopal Gas Disaster case. The Apex Court was considering the Bhopal Gas Disaster (Processing of Claims) Act, 1985. In para 100 of the judgment the Apex Court considered the concept of parens patriae. The following observations of the Court in my opinion are of importance:---

"If that is the position then, in our opinion, even if the strict application of the 'parens patriae' doctrine is not in order, as a concept is a guide. The jurisdiction of the State's power cannot be circumscribed by the limitations of the rational concept of the parens patriae. Jurisprudentially, it could be utilised to suit or alter or adapt itself in the changed circumstances. In the situation in which the victims were, the State had to assume the role of a parent protecting the rights of the

victims who must come within the protective umbrella of the State and the common sovereignty of the Indian people. As we have noted the Act is an exercise of the sovereign power of the State. It is an appropriate evolution of the expression of sovereignty in the situation that had arisen."

On consideration of the above what emerges is that both in England and India no adoption has been ordered so far by applying the principle of parens patriae. That was because in England adoption was not a part of the common law or based on equity. In India it was recognised as custom in a restrictive form. Once it is established that the right to be adopted is a fundamental right, in my opinion the position would stand dramatically altered. Under Article 225 of the Constitution subject to the provisions of the Constitution, and the provisions of any taw of the appropriate legislature., the jurisdiction of the law administered in existing High courts and the respective powers of Judges thereof in relation to the administration of justice shall be the same as immediately before the commencement of the Constitution. In other words in those High Court on whom the power of parens patriae is conferred, these powers stand protected under Article 225 of the Constitution of India. Under Article 226 apart from issuing writs there is a power in the Court to issue directions or orders. The right of the High Court saved under Article 225 coupled with the power to issue writs or directions under Article 226 it would be in my opinion open to a Judge, exercising guardianship jurisdiction to exercise the power of parens patriae to give minors in adoption.

33. What conclusion does the above discussion lead us to. One thing that has emerged from consideration of precedents on fundamental rights, directive principles and International Covenants is that the abandoned, the orphaned, the destitute or a similarly situated child has a right to be adopted as a part of his fundamental right to life. The fundamental right to life to become meaningful to the child includes the right to be adopted. The State, therefore, cannot deprive this right to the child. Deprivation can be in two forms, by executive instructions or by enacting legislation which would affect right to life as also by failing to issue instructions or enact legislation to give effect to this right to life. The two are but two sides of the same coin. If the State fails to enact legislation or issue administrative instructions in the exercise of its executive power can the courts as protectors and upholders of the Constitution remain judicially inactive or passive. While considering the judgments on the role of the judiciary in giving effect to the preamble and directive principles and international covenants while interpreting fundamental rights, courts have issued directions, where the State has failed to do. In the instant case as we have seen the right of adoption as a part of right to life has also been carved out from the International Conventions to which India is a signatory and from the directive principles as set out under Article 39(f) which stands embodied into Article 21. In the case of Maganbhai Ishwarbhai Patel (supra) the Apex Court upheld the right of the executive to enforce the International Conventions or Awards in the absence of legislation. The question, therefore, ultimately is whether this Court can issue directions which would be in the nature of subordinate legislation, pending legislation by the Constitutional arm namely the Legislature. The Constitution has conferred on the High Courts power under Article 226 to issue to any person or authority including in appropriate cases Government, writs in the nature of mandamus or any other direction or order. This is the Constitutional power conferred on the High Court. Apart from this Constitutional power this High Court also exercises the powers conferred on it under the amended Letters Patent. By virtue of Clause 17 as already stated, it has jurisdiction over infants. This jurisdiction has been traced and identified as the power of parens patriae. The power of

the king in England in other words, ..the power of the sovereign stands delegated to the Court exercising the jurisdiction over the person and property of minors. This power of the Court has been protected by Article 225 of the Constitution. We have also discussed the nature and extent of the power of parens patriae. The power to enact legislation in matters pertaining to adoption is traceable to Entry 5 of List III of the VIIth Schedule to the Constitution of India. That being in the concurrent list, the executive power can be exercised both by the State Government as also by the Union Government. Does this executive power of the State take away the power of parens patriae delegated to the Court. It must be remembered that the courts were exercising power of parens patriae atleast within this jurisdiction before the Guardians & Wards Act of 1890 was enacted. The Guardians & Wards Act in fact by section 3 has also saved the power of the Court. The power, therefore, over the person and property of minors was exercised by the courts. Such a power would be in the nature of both exercise of judicial as well as executive power. Therefore, within this jurisdiction in the absence of legislation considering Article 225 this Court in the matter of protection of the person and property of the minor as parens patriae can issue directions which would be protected by Article 225 of the Constitution of India. This power would be as a delegate, to issue executive instructions and judicial directions in conformity with the power protected by Article 225. It is true that historically both in England and India the power of parens patriae has never been exercised to give children in adoption. The reason is apparent. In England the right to adopt is not found as in the common law nor does it form a part of equity jurisdiction of English courts. The power has been conferred and is traceable to rights conferred by statute. In India, the right to adopt to a limited extent was part of the customary right of Hindus. This customary right which was recognised by law is now codified into the Hindu Adoption and Makintenance Act and is of wider amplitude than under Customary law. The Court as parens patriae, therefore, had no occasion to exercise the power of parens patriae in giving children in adoption. This position has now changed. The right of the orphaned, the abandoned, the destitute and/or similarly situated child has now been recognised as a part of his fundamental right founded in Article 21, namely the right to life. Once such a right has been traced the child cannot be denied the right to be adopted. The failure by the other two Constitutional Branches namely the Legislature and the Executive makes it possible for this Court to exercise its power of parens patriae. It is true that normally it is the father or the parents who has the control of the children. In the issue before us we have considered a class of children who have either been abandoned or given in custody of Homes under the provisions of the Juvenile Justice Act. These children ultimately have been given in guardianship and it is these children who have been given in guardianship over whom and/or in respect of whom the power of parens patriae is being exercised. To my mind, therefore, both under Article 225 as well as under Article 226 this Court can either pass directions or issue directions for giving effect to the fundamental rights of these children,

34. In the Book "What Next In Law" in the last chapter titled "Epilogue" Lord Denning's concluding sentence is 'so there it is. In this book I have stood the law on its head on the hope that you may help to get it the right way up'. These humble words of a great jurist made possible the task of trying to understand the dynamics of human rights. The cry of the orphaned child awoke me from the slumber of judicial insensitivity; the evasion of Constitutional responsibilities by the legislative organs made me search for judicial precedents and the Tagore Law Lectures published under the caption "The Dialectic & Dynamic of Human Rights in India" by Justice Krishna Iyer, the

propounder of the new Asian Jurisprudence served as a stimulus to reach out to justice. In proceeding to answer the issues that have arisen before me, I too perhaps may have taken liberty with jurisprudential principles. The road was and is full of pot holes. The judicial functionary does not possess the entire wherewithal to fulfill the constitutional objective of filling the pot holes. For the present it has been an attempt to avoid the pot holes, in order to activate the constitutional objective I hope the judgment will awaken the insensitivity of our law makers, so that all our children, all of them in the new millennium will have an opportunity to enjoy the joys of childhood, before the sun sets on the old.

35. I may now turn to the reliefs to be granted, conclusions and directions.

(1) The fundamental right to life of an orphaned, abandoned, destitute or similarly situated child includes the right to be adopted by willing parent/parents and to have a home, a name and a nationality. The right to be adopted, therefore is an enforceable civil right which is justiciable in a Civil Court;

(2) In the absence of any legislation setting out who can adopt, person or persons who has/have taken a child in guardianship under the Guardians & Wards Act will have the right to petition the courts to adopt the child;

(3) As jurisdiction to pass orders on guardianship is in the District Court and/or a High Court having jurisdiction under its Letters Patent, pending legislation, it will be these courts which have the right to give the child in adoption by way of a miscellaneous application in the petition for Guardianship.

(4) Considering that it is the welfare of the child which is paramount the Court before giving the child in adoption must satisfy itself, that it is in the best interest of the child that the person or persons whom guardianship of the child is given is and/or are suitable parent or parents.

(5) A period of 2 years must elapse before the Court considers the petition for adoption from the date the Court passes the order of guardianship. Before making an order of adoption the following directions will have to be satisfied. A home study should be available which must contain amongst other information the following:---

(a) The financial status of the adoptive parent or parents and their capacity to look after the needs of the child.

(b) The health and the medical Report of the adopted parent/parents.

(c) The opinions formed by the interviewer, after interviewing the adoptive parent/parents and the child of possible.

(d) Progress Report of the child after having been given in guardianship, including state of health.

(e) The cost of preparing the Report shall be borne by the adoptive parent/parents.

(f) Before passing final orders on the petition, the views of I.C.S.W. shall be heard. The costs of I.C.S.W. will be borne by the adoptive parent/parents. The adoptive parent/parents will have to deposit a sum of Rs. 500/- initially. Any additional expenses will be reimbursed by the adoptive parent/parents.

(6) As a child can be given in guardianship to person/persons eligible under the Indian Guardianship & Wards Act and as they also have been given the right to adopt, the issue whether a childless couple has a fundamental right to adopt need not be answered, though prima facie it may be possible to arrive at that conclusion.

(7) A Guardian/Guardians who have been appointed by courts in the past and whose guardianship continues, can apply for adoption if the period of two years has elapsed, since the date of order of appointment of guardianship.

(8) The legal consequences of an order of adoption will be that the personal law of the adoptive parent/parents would be applicable to the child whose right of inheritance will be the same as that of a natural born child.

(9) As a consequences of adoption the adopted parent/parents will have the right to apply and get rectified the Register of Births showing the adopted parent/parents as parents of the adopted child and bearing their name and surname if so desired by the adoptive parents.

36. These directions are binding and are issued to all State Governments and Authorities in the States and Union Territories within the territorial jurisdiction of this High Court under Article 226, as also and under Article 225 of the Constitution of India as parens patriae.

37. Before concluding I must place on record the Court's appreciation of all Counsel including Shri iqbal Chagla, Senior Counsel, as Amicus Curiae, the learned Advocate General of Maharashtra, the learned Additional Solicitor General, who appeared for the Union of India, and ably put-forth their propositions with a view to assist the Court. Apart from them the Court must also place on record the services rendered by Advocates, Mr. Colin Gonsalves, Mr. Mihir Desai, Ms. Nandita Chickermane, Mr. Ishwari Prasad Bagaria, Ms. Flavia Agnes and Ms. Lalita Raj, who prepared compilation consisting of material and case law on the subject. Ms. Asha Bajpai, Author of "Adoption Law and Justice to the child", Indian Council for Social Welfare and the various adoption agencies who assisted the Court, Both the petitions disposed of accordingly.

Registry to send copy of this judgment to the Chief Secretary, Government of Maharashtra, the Chief Secretary, Government of Goa, and the Principal Secretary to the Prime Minister of India, New Delhi for necessary action.

Personal Assistant to issue ordinary copies to the parties/social organisations.